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NSW Sentencing Council
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Via email: sentencingcouncil@justice.nsw.gov.au

Dear NSW Sentencing Council

Thank you for the opportunity to lodge a submission on behalf of the Mid North Coast Community Legal Centre (MNCCLC) in response to the Repeat traffic offenders: Consultation Paper December 2018.

About the Mid North Coast Community Legal Centre

MNCCLC is based in Port Macquarie on the Mid North Coast of NSW. MNCCLC provides accessible and culturally responsive legal services to disadvantaged people living in the Kempsey Shire, Port Macquarie-Hastings and Mid Coast (Manning region) local government areas. MNCCLC aims to increase access to justice and empower individuals with knowledge of their rights and the ability to resolve their legal issues. MNCCLC recognises that access to justice is not equitable across our society and seeks to improve this inequity through their work. Last year, road and traffic offences were the most common legal issues raised by clients.

MNCCLC welcomes the NSW Sentencing Council's inquiry into repeat traffic offenders. The factors that contribute to reoffending are complex and varied. The consequences of sanctions such as licence suspension and fines are often devastating for those who already experience a high level of socio-economic disadvantage. We envisage a system that addresses the factors that contribute to offending in the first instance, whilst also ensuring that punishments for those who experience disadvantage are not unduly burdensome.

Characteristics of our catchment area

MNCCLC covers an area that includes the major centres in the Mid North Coast Region; Taree, Port Macquarie and Kempsey. Each of these are distinctly different communities with a range of legal needs, however there are many characteristics that they share. Each of these communities are classified as regional and remote, they all have an average household income lower than the national average and they all have a higher than average Aboriginal and Torres Strait Islander Population.¹

Clients who sought assistance for traffic related offences

Access to justice is limited for those on the Mid North Coast who find themselves before the courts in relation to traffic offences. MNCCLC operates a traffic program to assist those at the Taree Local Court, however there are many courts around the country where such a program does not exist. As a consequence, many of the most disadvantaged people of our community have to represent themselves. We note that the Aboriginal Legal Service and Legal Aid offer representation in some cases however this leaves a significant group of people unrepresented before the court.

In 2018, approximately 20 percent of our total clients were provided with advice or other assistance for a traffic or vehicle related offence. Most of these clients experienced financial hardship or received a Centrelink benefit. Twenty-eight percent identified as Aboriginal or Torres Strait Islander. Fifty-eight percent had recent traffic offences on their records and therefore classified as reoffenders.

These figures suggest that the impacts of traffic offences are more burdensome on some in our community than others. They demonstrate that many people experiencing financial hardship are presenting to court without legal representation or advice. Though these figures do not represent a broad cross section of those who offend and reoffend across NSW, these

¹ Australian Bureau of Statistics, *2016 Census Quick Stats By Geography*
<<http://www.abs.gov.au/websitedbs/D3310114.nsf/home/geography>>

requests for legal assistance do indicate a need. We suggest that this need should be addressed, not merely at the time of sentencing but rather through a preventative framework.

Addressing Traffic offending: a need for reinvestment

The safety of our community is undermined when individuals breach the road rules. To address traffic offending, a sanction based sentencing approach has largely been adopted. MNCCLC acknowledges the reasons why penalty based sentencing is utilised; including deterrence, to ensure an offender is adequately punished and held accountable for their actions, protection of the community, rehabilitation and as recognition of any harm caused by the offender.² Despite this, rates of reoffending for traffic offences are still high with approximately 38 percent of those who drive without a licence reoffending within 10 years.³ Thus we suggest that it is necessary to look holistically at the reasons why people commit traffic offences and why reoffending occurs.

We observe that there are complex factors that contribute to offending and reoffending. These range from disability, to unemployment, to social marginalisation. Studies have found a strong link between socio-economic status and reoffending.⁴ A NSW study about drink driving reoffenders found that a significant majority identified as Aboriginal or Torres Strait Islander and experienced high socio-economic disadvantage.⁵ These studies suggest that penalties and punishments have little effect on the root causes of offending and fail to reduce reoffending. Furthermore, there is little evidence to suggest that fines and disqualification periods in themselves reduce recidivism.⁶

MNCCLC suggests that judicial sentencing is only one strategy to reduce offending behaviours and that should be used in conjunction with other community-based supports. MNCCLC

² *Crimes (Sentencing Procedure) Act 1999* (NSW) s3A.

³ Winifred Agnew-Pauley and Jessie Holmes, 'Reoffending in NSW' (2015) 108 *NSW Bureau of Crime and Justice Statistics* 1, 4.

⁴ Discussed in Susan B Tucker and Eric Cadora, 'Justice Reinvestment' (2003) 3 *Ideas for an Open Society: Open Society Institute* 3,3 and NSW Director of Public Prosecutions, *Preliminary Submission No 16 to Repeat Traffic Offenders Consultation Paper* (PTR16), 12 June 2018.

⁵ Tasmania Law Reform Institute, *Responding to the Problem of Recidivist Drink Drivers*, Report No 24 (2018), 12.

⁶ *Ibid* 26.

suggests that the NSW Sentencing Council look beyond legislative reforms to sentencing frameworks and address some of the complex factors that perpetuate disadvantage. In essence, judicial sentencing should take place within a broader framework that considers restorative justice principles.

The key restorative justice model that addresses the socio-economic factors that attribute to offending is justice reinvestment; originally introduced by the US Open Society in an attempt to stop rising incarceration levels and budget deficits in the USA. They identified that reoffending was heavily linked to other socio-economic factors, as opposed to individual inclinations to commit crime. They proposed a data driven and locally tailored model that involved investing money previously earmarked for increasing the prison system, into social programs that would strengthen communities and reduce the flow of people into the system.⁷ Aspects of this model have since been adopted throughout the US and in other countries.⁸

The model has been most recently championed in NSW through the Maranguka Project in Bourke. Since its introduction in 2013, KPMG has undertaken a study into the impact of the justice reinvestment model. In November 2018, they reported on the significant reduction in crime, the increase in community strength and the savings the project has created for Government. Most notably, through the introduction of many community programs, including the Birrang Learning Driving Program, the town has seen a 35 percent reduction in individuals charged with driving offences and assisted 236 people to obtain a driving licence.⁹

Data from the review supports the notion that social need is at the root of many traffic offences. MNCCLC proposes that using the justice reinvestment model, the NSW Sentencing Council should consider that alternative programs and resources be made available for people which are complimentary to proportionate penalties. This approach acknowledges that vulnerable groups have particular needs and that these require a targeted approach. We propose that programs to reduce recidivism should be tailored to the specific demographic or community in which they are delivered.

⁷ Tucker and Cadora, above n 3, 4.

⁸ Australian Law Reform Commission, *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, Report No 133 (2017), 133.

⁹ Just Reinvest, *New Evidence from Bourke* <<http://www.justreinvest.org.au/new-evidence-from-bourke/>>

MNCCLC acknowledges that steps have already been made by the Government in this direction. For example, the abolition of the HTO frameworks and the decrease in the automatic disqualification periods for some driving offences, supports the notion that harsher penalties do not equate to reductions in traffic offending.¹⁰ However, we argue that measures to curb reoffending should not simply focus on statutory penalties but instead also foster community strength at a local level. We recommend that any reform for reoffenders work in conjunction with other socio-economic supports, particularly where the policy objectives are to rehabilitate the offender and make deterrence effective.

Our responses to the questions below are founded on these justice reinvestment principles.

Question 6.1 Ignition Interlock Programs

(1) Is the NSW mandatory alcohol interlock program effective in dealing with repeat traffic offending? If so, why? If not, why not?

(2) What changes could be made to the NSW mandatory alcohol interlock program to reduce repeat traffic offending?

MNCCLC supports the NSW mandatory interlock program and agrees that it could be effective in reducing repeat traffic offending.¹¹ However, we suggest that the current cost of installing the device, approximately \$2,200 a year, and the difficulties in obtaining exemptions, make the program expensive for those on a low income or Centrelink benefit. Though there are 35 percent concessions available to those who can demonstrate their low socio-economic status, the amount required is still significant for those with limited financial means.¹² Additionally, those who are unable to cover these costs may be disqualified from driving for five years.¹³ This may have an impact of the efficacy of the overall program. While we support the program and believe in the viability of it to reduce repeat drink driving, we propose that either the costs be reduced or more concessions be made available to make the interlock program affordable for those in a low socio-economic position.

¹⁰ See changes in *Road Transport Amendment (Driver Licence Disqualification) Act 2017* (NSW).

¹¹ NSW Sentencing Council, *Repeat Traffic Offenders: Consultation Paper* (December 2018), 98-102.

¹² Services NSW, *Alcohol Interlock Program* <<https://www.rms.nsw.gov.au/roads/safety-rules/demerits-offences/drug-alcohol/interlock-program.html>>

¹³ *Road Transport Act 2013* (NSW), s211 (1).

Question 7.1 What communities, in addition to those listed in Chapter 7, might require special attention when dealing with driving offences?

In addition to the groups already identified by the Sentencing Council, we suggest that people with an intellectual disability (ID) are another community that face challenges accessing social and legal justice. These barriers impact on their rates of offending and reoffending. More should be done to address these factors so that reoffending rates in relation to traffic law are reduced.

People with ID are overrepresented in the criminal justice system generally. Reoffending rates for those who have ID are higher than offenders who do not experience ID and they return to prison more often. Estimated figures for prisoners with ID (an IQ less than 70)¹⁴ range from 7 to 20 percent.¹⁵ In NSW, a study by the NSW Law Reform Commission found that up to 23 percent of people before the Local Court charged with a criminal offence may have ID or borderline ID.¹⁶ Since this research was conducted, there is little evidence to suggest that things have improved.¹⁷ Traffic and vehicle regulatory offences are one of the most common types of offence committed by people with an ID.

The reasons why people with ID are overrepresented in the criminal justice system are multifaceted and complex. People with an ID often lack adequate representation. Police, Magistrates, Court Officers and Lawyers frequently lack the skills needed to appropriately support an individual with ID and their associated behaviours. More should be done to ensure that all those who encounter the criminal justice system in relation to traffic offending are dealt with by individuals who are adequately skilled and resourced.

The use of specialist courts should also be considered for those with an ID. MNCCLC is encouraged by pilot programs such as the Cognitive Impairment Diversion Program (CIDP) that aim to divert low level offenders with a cognitive impairment away from the criminal

¹⁴ American Psychiatric Association, *Diagnostic and statistical manual of mental disorders* (American Psychiatric Publishing, 5th ed., 2013).

¹⁵ Devon Indig et al, *Juvenile Justice, 2009 NSW Young People in Custody Health Survey: Full Report* (2011), 15.

¹⁶ Study discussed in New South Wales Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System: Appearances Before Local Courts*, Report Number 4 (1993).

¹⁷ Eileen Baldry, Leanne Dowse and Melissa Clarence, 'People with mental and cognitive disabilities: pathways into prison' (Background paper for Outlaws to Inclusion Conference, UNSW, February 2012), 2.

justice system and towards disability and community supports. More research should be done into programs such as the CIPD so that the efficacy of such services can be improved and expanded for other regions across NSW. Currently, this program is only available in two NSW courts and it is not clear whether it will continue after the pilot period ends in 2019.¹⁸

Recidivism rates for people with ID are heavily influenced by a person's community-based supports. The operation of the NDIS has a role to play in ensuring that those with ID are sufficiently supported. Similarly, social security, housing and health supports for people with an ID should also be examined to ensure that their needs are being sufficiently met. All Government and Non-Government services (State and Commonwealth) must work together to ensure that adequate support is provided to individuals with ID to improve recidivism rates both in respect of traffic law and their overrepresentation within the criminal justice system more generally.

Question 7.2 What changes should be made so that traffic law operates effectively for people in remote and regional communities?

The MNCCLC recommends a preventative approach in reforming traffic law so that it operates more effectively for those in regional and remote areas.

MNCCLC recommends that additional transport opportunities be considered to reduce the risk that people will reoffend. Individuals who live in rural and remote areas are more likely to experience transport disadvantage and the Mid North Coast is no exception to this. Access to affordable and reliable transport is limited in the region. Taxis are expensive to travel from town to town, buses are limited and infrequent, while trains between the centres run three times per day. Heavy reliance on private vehicles is common and therefore licence disqualifications and restrictions have significant impacts. An absence of vehicle accessibility poses challenges for those who have work, study, complex medical needs or family and carer responsibilities. For this reason, disqualification periods and heavy fines can be socially

¹⁸ Justice NSW, *Cognitive Impairment Diversion Program: Fact Sheet*
<<http://www.localcourt.justice.nsw.gov.au/Documents/Facts%20Sheets/Cognitive%20Impairment%20Diversion%20Program/CIDP-factsheet-stakeholders.pdf>>

isolating, burdensome and contribute to reoffending for those in already low socio-economic positions.

Accordingly, we suggest that additional transport measures be introduced in consideration of these challenges. These measures may include additional public transport options or subsidies for people to access other types of community or private transport. Currently, there are many communities in the MNCCLC catchment that have no access to public transport. Moreover, the primary form of public transport that is available in two of the communities is the School Bus. Increasing the availability of public transport or subsidising other community transport options would reduce reliance on private vehicles for many and could reduce rates of reoffending.

The following case study highlights the difficulties that limited transport can pose:

CASE STUDY ONE

“Sophie”

Sophie was charged with driving on a disqualified licence. At the time, Sophie was escaping a domestic violence relationship with her three children. There were no buses running near her house this Sunday. Sophie was pregnant and had regular doctor’s appointments due to some complications. Sophie also needed a licence to take her kids to school.

In the absence of public transport options, Sophie knowingly drove on a disqualified licence. She recognised that she had been in the wrong but due to the lack of alternative options, she felt left with little other option. MNCCLC assisted Sophie to do the Traffic Offenders Intervention Program and she was able to regain her licence. Without this service, Sophie would have been further disqualified from driving, yet admits that out of necessity, she would have needed to continue to do so.

Question 7.4 What changes should be made so that traffic law operates effectively for Aboriginal people?

MNCCLC is encouraged by the NSW Sentencing Council's acknowledgment that the historical treatment and current legislative framework in which Aboriginal and Torres Strait Islander Peoples exist requires change. MNCCLC recognises that Aboriginal and Torres Strait Islander Peoples are the original owners of the Lands, Seas and Rivers that make up Australia. We recognise the long living culture and lore that existed prior to colonisation. We recognise the history that has caused Aboriginal and Torres Strait Islander Peoples much suffering and disadvantage. We recognise that remnants of this legislative framework were instrumental in this disempowerment and continue to perpetuate disadvantage today.

MNCCLC recognise that this is a contributing factor to the overrepresentation of Aboriginal and Torres Strait Islander People in prisons; we agree that this structure needs to be altered so that Aboriginal and Torres Strait Islander People experience greater substantive equality before the law.

For Aboriginal and Torres Strait Islander People, substantive inequality is evident in the operation of traffic law. We note that the transport disadvantage discussed above is a significant barrier in Aboriginal and Torres Strait Islander communities, who are often situated in remote areas, well outside of public transport routes. Therefore, we suggest that these communities need more reasonably priced and accessible public transport options.

Three other barriers, as identified in the Consultation Paper¹⁹ and the Auditor General's Performance Audit Report (2013),²⁰ are: literacy challenges, birth certificate difficulties and a lack of full licence holders able to supervise drivers. We suggest that these barriers cannot be adequately addressed through amendments to penalties nor to the *Crimes (Sentencing Procedure) Act 1999* (NSW). The approach to reducing offending and reoffending for Aboriginal and Torres Strait Islander People should take a holistic approach. It should acknowledge the practical and socio-economic challenges that are often experienced by

¹⁹ NSW Sentencing Council, above n 10, 135.

²⁰ NSW Auditor-General, *Improving Legal and Safe Driving Among Aboriginal People*, Performance Audit Report (2013), 5.

Aboriginal and Torres Strait Islander People. We suggest the following for overcoming the above challenges.

MNCCLC recommends that learn to drive programs be provided with more consistent funding and more be done to improve youth engagement. In many regions, particularly on the Mid North Coast, funding for these programs is sporadic and haphazard, making it difficult for these programs to gain traction and work effectively.

To address the literacy challenges faced by many, MNCCLC proposes that the Driver Knowledge Test be made available in a more culturally appropriate format. Rather than being another literacy test, it could be more image focused and available in plain English. In NSW, the current test is available in multiple languages, including Chinese, Spanish and Korean. It seems only appropriate that the test should be made more accessible to people who may have literacy challenges, including Aboriginal and Torres Strait Islander people. Making the test more image focused and in plain English would assist with accessibility. Alternatively, we suggest that more assistance be provided to Aboriginal and Torres Strait Islander communities in preparing for the test. For example, there could be a program established through the local Aboriginal Land Council where Aboriginal peoples can come to practice the test or be provided some assistance in studying for the test with an Aboriginal Identified RMS employee.

In addressing the challenges faced by the absence of birth certificates which antedate getting a licence, MNCCLC recommends that more assistance be provided to those who need to obtain a birth certificate. This may include making the process of accessing a birth certificate simpler and available in plain English. There should also be greater access to Births, Deaths and Marriages within Aboriginal and Torres Strait Islander communities and increased assistance provided for those who need to obtain a birth certificate. Currently, community legal centres such as the MNCCLC, are assisting many young people with this process, however there needs to be more resources made available.

The following case study exemplifies some of these challenges.

CASE STUDY TWO

“Ryan”

MNCCLC is assisting a young person from Taree who has been unable to apply for a Learner Licence as they have not been able to acquire a birth certificate. He identifies as Aboriginal and Torres Strait Islander.

The young person in question has been couch surfing and occasionally lives with his extended family. He has limited contact with his parents and as such there have been difficulties in gathering the required identification documents in order to make an application.

This young person has ultimately needed assistance from a Community Legal Centre to work through the process of applying for a birth certificate before being able to apply for their Learners licence.

Finally, looking at the challenges faced by young Aboriginal and Torres Strait Islander drivers in finding driving supervisors and accumulating their hours, consistent funding should be provided to Learner Driving Programs. There is a lack of licenced drivers in Aboriginal and Torres Strait Islander communities, with less than half of those eligible possessing a licence.²¹ As young Aboriginal and Torres Strait Islander People are starting to drive, which is often a necessity in regional and remote communities, there is limited supervision available. This leads to unsafe and illegal driving, which ultimately leads to offending and reoffending, often out of necessity. As discussed earlier, MNCCLC is encouraged by the success of the Birrang Learning Driving Program in Bourke that has seen 236 people obtain their licence in three years and led to a 35 percent reduction in traffic related offences. In our community, programs such as Driving Change²² and TIDE²³, assist Aboriginal and Torres Strait Islander learner drivers to complete their hours. They are invaluable in overcoming these systemic

²¹ Australia Law Reform Commission, above n 7, 414

²² Driving Change, *Licensing Support Programs* <<https://www.drivingchange.com.au/other-programs/>>

²³ TIDE, *Drivers Licensing Support Programs* <<https://www.tide.org.au/>>

barriers to licenced driving that currently exist for Aboriginal or Torres Strait Islander People. Unfortunately, both of the above examples experience regular funding shortages and cut-offs. These programs require consistent and certain funding for them to be effective.

The following case study shows the impacts that sporadic funding of these programs can produce.

CASE STUDY THREE

“Michelle”

Michelle was charged with driving without a licence and driving recklessly. She was 18 years old and identified as Aboriginal and Torres Strait Islander. Michelle had wanted to get her Learners Driving Licence but was nervous about the Driver Knowledge Test and couldn't afford the costs. Michelle was charged while driving one evening to get food for her three younger siblings as there was none in the house.

There were no buses operating this evening and Michelle had limited options to fulfil her caring responsibilities. Michelle's case was adjourned so that she could get her licence. Michelle could not afford her licence and turned to a Learner Driver Program for help. At this time, the Learner Driver Program was defunded and therefore Michelle had to return to court for sentence, without obtaining her licence.

We thank you for your consideration of our submission.

Yours faithfully,



Mid North Coast Community Legal Centre